863

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CENTRAL TRUST COMPANY, of New York, (a corporation), and the HELENA POWER AND LIGHT COMPANY (a corporation),

Appellants.

vs.

JOHN W. WARREN,

Appellee.

REPLY BRIEF OF APPELLANTS.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
H. G. & S. H. McINTIRE,
Solicitors for Appellant Central Trust Company.
H. S. HEPNER,
Solicitor for Appellant Helena Power and Light Company

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At the conclusion of the oral argument of the above cause, on October 8, 1902, the court granted leave to the appellants to file a reply brief within six weeks from said date; in availing themselves of such permission appellants respectfully submit the following:

I.

As to appellee's motion to dismiss the appeal.

The hearing of this appeal was duly set for October 8, 1902. On October 3, 1902 at Helena, Montana, appellants were first served with notice that an application would be made on said October 8th to dismiss their appeal, and at the same time were served with a copy of appellee's brief herein. They had served their brief on appellee on August 27th, 1902. Owing to the shortness of the time between October 3rd and 8th it was impossible for appellants to prepare and have printed their brief in

reply. Rule 21, subdivisions 1 and 2, of this court, provides:

"All motions to the court shall be reduced to writing * * * and shall be served upon opposing counsel at least five days before the day noticed for the hearing.

"No motion to dismiss except on special assignment by the court, shall be heard, unless previous notice as above has been given to the adverse party, or the counsel or attorney of such party." It is quite apparent that by the aforesaid rule this court intended that full five days notice of a motion should be given as a condition precedent to its consideration. In computing time where an act is required to be done a certain number of days or weeks before a certain other day upon which another act is to be done, the day upon which the first act is to be done must be excluded from the computation and the whole number of days or weeks must intervene before the day fixed for doing the second act.

Ward vs. Walters, 63 Wis., 39.

Garner vs. Johnson, 23 Ala., 494.

Excluding October 3rd, the day of service and October 8th, the day noticed for the hearing of the motion, there are but four days and consequently in this instance Rule 21 *supra* has not been complied with.

But if the court holds that it will consider the motion, then we submit there is no merit in it. The first ground is that this court has no jurisdiction to review a part of a decree, and Canter vs. Am. Ins. Co., 3 Peters 316 is cited as authority. In that case, as we understand it, an attempt was made

to have the Supreme Court review a matter of costs. Its applicability to the present case is not apparent. If the two Montana cases construing the then procedure of that state could be considered as having any bearing upon the procedure of this court, then it is only necessary to show that the same are no longer authority, see Bank vs. Fuqua, 11 Mont., 290. The rule in the Federal courts on this point is clearly stated by Mr. Foster in his work on Federal Practice (3rd Ed.) Vol. 2, sec. 503, p. 1204 as follows:

"Under the Federal Judiciary Acts a different definition of a final decree in equity has been made. For the purpose of appeals every decree is considered final which decides the right to property and orders that it be sold or delivered to the party, or creates a lien upon property by the issue of receiver's cetificates, or otherwise; or directs a specific sum of money to be paid to a party, or to an intervenor, although by a stranger to the suit or out of a fund in court, provided that the successful party is entitled to compel its immediate execution." See also the cases cited in note 9 to the said page.

In Central Trust Co. vs. Grant Locomotive Works, 135 U. S. 207 it is held that "A decree in a suit for foreclosing a railroad mortgage that the claim by an intervening creditor of an interest in certain locomotives in the possession of the receiver and in use on the road, was just, and entitled to priority over the debt secured by the mortgage, is a final decree, upon a matter distinct from the general subject of the litigation; and it cannot be vacated by the court of its own motion after the expiration of

the term at which it was granted," (Second syllabus) and as to the right of appeal from such a decree, the opinion in said case, pages 224, 225 holds:

"In Trustees v. Greenough, 105 U. S., 527, an appeal from an order for the allowance of costs and expenses to a complainant suing on behalf of a trust fund, was sustained. In Hinckley v. Gilman, Clinton & Springfield Railroad Company, 94 U. S., 467, a receiver was allowed to appeal from a decree against him to pay a sum of money in the cause in which he was appointed. In Williams v. Morgan, 111 U. S., 684, a decree in a foreclosure suit fixing the compensation to be paid to the trustees under a mortgage from the fund realized from the sale, was held to be a final decree as to that matter; and in Fosdick v. Schall, 99 U. S. 235, a decree upon an intervening petition in respect to certain cars used by a railroad company under a contract with the manufacturer was so treated. There was a fund in court in that case, but in principle the orders here are the same. And see Farmers Loan & Trust Co., Petitioner, 129 U. S. 206, 213."

It is no ground of objection that an appeal is expressly limited to a part of the decree below, when this is the only part from which appellant could appeal.

Nashua Co. v. Boston Co. (1st C. C. A.) 61 Fed., 237.

And see 3 Desty Fed. Proc., p. 1567.

In Shiras Equity Practice (2nd Ed.) p. 117, the following is said: "If, however, the suit involves separable matters of controversy and the trial court determines them separately, an appeal may be taken from each de-

cree entered, which is final, with respect to the controversy affected by it."

The case of Eddy v. Letcher 57 Fed., 115 (8th C. C. A.) is like the case at bar. That was a foreclosure suit. In it an intervening petitioner was allowed damages for the negligent killing of her husband. The appeal was taken from the judgment rendered in favor of intervenor. It was sustained. The case was afterwards appealed to the Supreme Court which held that the judgment of the Circuit Court of Appeals was final. In the course of the opinion the Supreme Court said: "Nor can the conclusion be otherwise because separate appeals may be allowed on such interventions. Decrees upon controversies separable from the main suit may indeed be separately reviewed" &c.

Rouse v. Letcher 156 U. S., 47.

In the case of Central Trust Co. v. Madden ,(4th C. C. A.) 70 Fed., 451, Chief Justice Fuller rendering the opinion, the first syllabus reads: "One M. filed an intervening petition in a railroad foreclosure suit claiming priority over the mortgage, for a judgment recovered by her against the railroad company for personal injuries, under the statute of South Carolina, giving priority to such judgments over mortgages. A decree was entered on such petition, adjudicating priority to the judgment, finding the amount due and decreeing that the priority must be secured in any order of sale of the railroad thereafter made. Held, that such decree substantially and completely determined the rights of the parties and was

appealable, though the main suit had not reached a final decree."

In Illinois Trust & Savings Bank v. Kilbourne (9th C. C. A.) 76 Fed., 887, the appeal was from part of the decree allowing intervenor's claim. True, the appeal was dismissed but on the sole ground that all the parties interested had not joined in the appeal. And in Coler v. Allen (9th C. C. A.) 114 Fed., 610, this court sustained and decided an appeal from a decree of the circuit court dismissing a bill in intervention which was sought to be interposed in a suit to foreclose a mortgage.

In considering this motion the court's attention is called to the prayer of appellee's answer, Record p. 49, which reads:

"Wherefore ,this answering defendant consents to an immediate sale of the property of the said defendant Helena Power and Light Company, as prayed for in the complaint, but respectfully prays that his said judgment may be adjudged to be a lien upon the property of the said defendant company within the county of Lewis and Clarke, State of Montana, superior to the lien of complainant's mortgage, and that it be decreed that out of the proceeds of the sale of the said property of the said defendant company the amount of the judgment of this answering defendant be first paid, together with his costs herein, and that this answering defendant have such other and further relief as to the court may seem just." There is no controversy between the parties as to the suit to foreclose. The decree is one by consent save as to the priority of Warren's claim. That was the

only matter litigated between the parties, and consequently is the only matter that could be brought to the attention of this court for review. The argument of appellee, Brief p. 3-4 is fallacious. It loses sight of the fact that as to the Helena Power and Light Company the decree foreclosing the mortgage or deed of trust was taken *pro confesso,* in other words everything in the decree except that allowing priority to appellee's claim was by consent. That the Central Trust Company has not "obtained substantially all the relief asked for by them" is apparent from the fact that the fund to which it is legally entitled to satisfy the claims of the bondholders whose bonds are secured by the deed of trust in question, is, by the decree of the circuit court, reduced in the substantial sum of $2,663.89 with eight per cent interest from April 8, 1902. See Record p. 69.

It is further said in said motion and in appellee's brief p. 4, that the decree has been enforced. This is an extraordinary statement in view of the record herein, pages 79-82. True, there has been a sale of the property covered by the mortgage or deed of trust which was foreclosed, but that is something entirely distinct from the controversy between appellants and appellee. Indeed, having consented to such sale, See Record p. 49, it is an anomalous position for appellee to assert that by reason of it the appellants are no longer in position to contest the priority of appellee's claim, a distinct and separable controversy altogether. The right to the present appeal can in no wise be affected by any of the proceedings in the main suit. This is clearly the law. See Central

Trust Co. v. Madden, 70 Fed., 452, 453, and the cases cited *supra.*

It is next claimed in the motion to dismiss that appellants have no right to join in the appeal. That they have such right is, however, settled beyond controversy.

See 2 Foster's Federal Practice, pp. 1218-1219 and the cases there referred to.

Indeed, it is the settled doctrine of this court, as announced in Illinois Trust Co. v. Kilbourne, 76 Fed., 887, and of all the Federal appellate courts that if all the parties affected by the judgment or decree do not join in the appeal, or are not made parties to it by proceedings in the nature of "summons and severance" the appeal will be dismissed on the court's own motion. It was by reason of this that the present appeal, No. 863, in addition to that referred to in appellee's brief p. 6, No. 839, was perfected. Of course this was proper.

2 Desty's Fed. Procedure sec. 545.

In Farmers Loan &c. Co. v. McClure (8th C. C. A.) 78 Fed., 211, it was explicitly held that the mortgagor in a foreclosure suit must join in an appeal, or be in some manner bound by the decision on appeal as he is so far interested in seeing to the disposition of the funds derived from the mortgaged property as to be an indispensable party to the proceedings on appeal, and this is self-evident. It is beyond the question to say that "it is a matter of absolute indifference" to the Helena Power and Light Company whether complainant or appellee shall be first paid out of the avails of the mortgaged property. The debt to the complainant is one founded on con-

tract, for moneys that doubtless went into the purchase and building up of the company's property; that of appellee is upon a judgment for the negligent acts of some careless employee; to the ordinary conscience the claim first mentioned would be deemed of higher sanctity. But aside from that the company has the right to prefer the one to the other. This is held by this court in Coler v. Allen 114 Fed., 609 and by the Supreme Court of Montana in Ames &c. Co. v. Heslett, 19 Mont., 188. Having, as they clearly have, under the authorities above cited, the right to join in the appeal, appellants had and have the right to join in the assignment of errors and in the bond on appeal. It would have been a foolish thing to have had two assignments of error, identical in character, and the law neither does nor requires useless things to be done. Besides the judgment awarding appellee priority is a joint judgment, it affects both appellants.

Masterson v. Herndon 10 Wall., 416.

2 Foster's Federal Practice p. 1218 *et seq.*

Appellee asserts that parties may not join in an assignment of error unless they join in the exception upon which it is founded, and further that the Helena Power and Light Company acquiesced in the decree in the court below, Brief pp. 6-7. This, too, is a fallacy. It confounds the decree in the main suit, the foreclosure proceeding, to which all the parties consented, with the controversy between appellants and appellee as to the latter's right of priority. To the judgment awarding this priority both appellants excepted in the circuit court; neither has ever acquiesced in it, there or elsewhere. This is abundantly

shown by the record, pages 75, *et seq.*, and by the attitude of the appellants on this appeal. The basis of the complaint here is not the denial of any motion in the circuit court but the rendition of a decree in favor of appellee awarding him priority as to his claim over that of the Central Trust Company. See the assignment of Errors, Record p. 75; the order allowing the appeal, Record p. 79; the bond on appeal, Record p. 82, and the Citation, Record p. 84.

Since writing the foregoing appellee has this 7th day of November furnished us with a copy of his supplemental brief. No additional reason is advanced in it to sustain the motion to dismiss, nor is any attempt made in it to show that as to the procedure in the Federal courts this appeal is not strictly in line with reason and precedent. Reference is made to the case of Farmers Bank v. Key, 33 Oregon, s. c. 54 Pac., 206, but the barest inspection of that case shows its inapplicability to the case at bar. Indeed, it is not apparent to appellants, how it can be suggested that as to matters of procedure in the Federal courts reference can or should be made to other than Federal authorities.

II.

Much is said in appellee's original brief to the effect that the Helena Power and Light Company is not formed under the provisions of Chapter XXV of the Compiled Statutes of Montana of 1887, but in the light of what we have said in our original brief, pages 13 to 20, and particularly in view of the observations of the Supreme Court of Montana as to this particular corporation being formed

under that chapter,—see the quotation on page 16 of our original brief,—there would seem to be little room left for further discussion on that point. Appellee apparently recognizes the force of this by asserting as he does in his supplemental brief, that such chapter XXV does not authorize the making of a mortgage by a corporation created thereunder. We will discuss this contention later on, taking up now the attempt which is made to escape the force and effect of the decision of this court in Massachusetts Loan & Trust Company v. Hamilton, 88 Fed., 589, on the ground that the street railway company there referred to was not a Montana corporation and consequently not bound by the provisions of section 707 of Chapter XXXV of such Compiled Statutes of Montana. In this connection it is said in said supplemental brief, page 4, "If it (the Helena Power and Light Company) was created under the provisions of Chapter XXXV the appellee's judgment is confessedly superior to the mortgage." No such concession has ever been made. It is not the law. Section 707 referred to uses the language, "a judgment against any railway company," &c. Having no application, as was decided by this Court in the Hamilton case to a street railway corporation created under other than the Montana statute, then it can have none to a Montana corporation, for in Montana we have the following Constitutional provision, Article XV, section 11:

"No foreign corporation shall do any business in this state without having one or more known places of business and an authorized agent or agents in the same, upon

whom process may be served. And no company or corporation formed under the laws of any other country, state or territory, shall have, or be allowed to exercise, or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state."

This provision has received a construction by the Supreme Court of that state (and consequently under numerous authorities the Federal courts will follow it) to the effect that any statute which imposes upon domestic companies a burden not imposed upon similar foreign corpanies operating within the state was annulled by the adoption of such constitutional provision and is consequently invalid as to domestic corporations. See Criswell v. Montana Central R. Co., 18 Mont., 167. In that case section 697 of said chapter XXXV which reads:

"That in every case the liability of the corporation to a servant or employee acting under the orders of his superior, shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employe not appointed or controlled by him as if such servant or employe were a passenger," was under discussion. There is no difference in principle, so far as said section of the constitution is concerned, between that section and the one under discussion (707) and it must follow that as the one is invalid as imposing a burden upon a domestic company which a foreign company is not subjected to, then the other must also be invalid. This was adverted to on the oral argument, and it would seem that it does

away with the discussion as to what law the Helena Power and Light Company owes its creation.

III.

Assuming, then, that said company was created under the provisions of Chapter XXV, what is there in appellee's contention that that statute does not authorize companies formed thereunder from mortgaging their property? This contention is made for the first time in appellee's supplemental brief, and in view of the record in this case, it is, to say the least, somewhat extraordinary. It was not even suggested in the circuit court, appellee in his answer assailing not the validity of the mortgage but its priority to his claim and joining in the prayer that the same be foreclosed and the property covered thereby be sold to satisfy his claim, See Record p. 49. It is a familiar principle that one may not in the course of litigation occupy inconsistent positions, he may not blow hot and cold. Robb vs. Vos. 155 U. S. 13. In addition to this, it should be further observed that the decree adjudges (Record p. 59), that the bonds and the mortgage or deed of trust securing them were both executed by the Helena Power and Light Company in the "due exercise of its corporate power," and further (Record pp. 60-61), "That the said mortgage or deed of trust set forth in the bill of complaint * * * * is a valid and subsisting mortgage and constitutes a valid and subsisting lien upon the mortgaged property, premises and franchises subsequent only to the lien of the judgment of the defendant John W. Warren," &c. But aside from this there can be no serious question that a corporation created under

Chapter XXV of the Montana Compiled Statutes of 1887 had full power, under the statutes of that state as they existed in 1895, the date of this instrument, to borrow money for the purposes of the corporation and to secure the same by mortgage of its property. Reference is made in appellee's brief, page 7, only to section 482 of such Compiled Statutes, which, among other things, empowers corporations formed under that chapter "to sue and be sued * * * * to hold, purchase and convey such real and personal estate as the purposes of the corporation may require." This as we will show is sufficient to confer the right, but in addition to that we find section 447 of said statute which provides that persons incorporating themselves under that chapter shall be a body politic "in fact and in name, by the name stated in such certificate, and by that name have succession, and shall be capable of suing and being sued in any court of law or equity in this territory; and they and their successors may have a common seal, and may make and alter the same at pleasure, *and they shall*, by their corporate name, *be capable* in law *of acquiring by purchase*, pre-emption, donation, or otherwise, and holding or *conveying by deed or otherwise any real or personal estate whatever*, which may be necessary to enable the said company to carry on their operations named in the certificate," and the further distinct recognition and grant of the power to mortgage contained in section 1555, page 1073 of such Compiled Statutes, viz:

"That all mortgages or deeds of trust of both real and personal property within this territory *heretofore or here-*

after executed by any incorporated company, shall be governed by the law relating to mortgages or deeds of trust of real property, and be recorded in the office of the recorder of every county where any part of said property is situated, and the same *shall be valid* notwithstanding the possession of such property is retained by such person or persons, company or corporation; Provided, That any mortgage or deed of trust which shall be hereafter executed shall be accompanied by the affidavit specified in section 1 of the act entitled "An act concerning chattel mortgages" approved February 19, 1881 (section 1538 of the Compiled Statutes of Montana), and which said affidavit may be made on behalf of any such company or corporation by the president, secretary or managing agent thereof." (The instrument in question is executed in compliance with this provision, See Record pp. 41-42.) Under this latter section, the right is unquestionable. But under sections 447 and 482 referred to *supra* the power exists.

There the right to sell, to convey, is granted, and the rule is that where such right exists it includes the right to mortgage, which is a sale with a defeasance, or, as in the case at bar, to give a deed of trust, which under the Montana decisions is a conveyance of the legal title. First Nat. Bank v. Bell, &c. Co., 8 Mont., 32 which follows the doctrine of Koch v. Briggs, 14 Cal., 265 and Fogarty v. Sawyer, 17 Cal., 589, and which case (that from Montana) was affirmed in Bell v. Butte Bank 156 U. S., 476.

In 3 Cook on Corporations (4th Ed.) sec. 779 we find the

following: "A corporation, other than a railroad corporation, may mortgage its real estate and personal property for the purposes of securing its bonds or other evidences of indebtedness, unless there is some provisions in its charter expressly prohibiting or regulating this right. The right to mortgage is a natural result of the right to incur an indebtedness."

And in section 783 of the same work the following:

"If the charter authorizes the corporation to sell, this is sufficient authority to mortgage. Power to sell implies the power to mortgage."

And in the foot-note to the last section, the following:

"Express power given to sell gives also power to mortgage., Willamette etc. Co. v. Bank etc., 119 U. S. 191 (1886); McAllister v. Plant, 54 Miss., 106 (1876). Power to "transfer" the property, gives power to mortgage it. Dunham v. Isett, 15 Iowa, 284 (1863). Power to sell gives power to mortgage. Bickford v. Grand Junction Ry., 1 Can. Sup. Ct., 696, 736 (1877). Power to "Transfer all its property, rights, privileges and franchises" gives power to mortgage. East Boston etc. R. R. Co. v. Eastern R. R., 95 Mass., 422 (1866). Power to sell gives power to mortgage. Branch v. Atlantic etc R. R. 3 Woods, 481 (1879); S. C. 4 Fed. Cas. 12. Power to mortgage gives power to sell at foreclosure sale the right of way, franchises, etc. New Orleans etc. R. R. v. Delamore, 114 U. S. 501 (1885). *Under the general statutes authorizing every corporation to mortgage its real and personal property, a street railway company may mortgage its street railway.* Hovelman v. Kansas City H. R. R., 79 Mo., 632 (1883)."

Appellee's contention seems to be that a corporation which exercises *quasi* public functions may not mortgage its property without legislative consent, and he says, brief, page 10, that "by the authorities, a gas company or an electric light company, is subject to exactly the same restrictions in the matter of executing mortgages upon its property as is a street railway company," and further, on the same page of his brief, he says: "If it has *public duties to perform*, it cannot alienate its property by sale, lease or mortgage without the express consent of the legislature. That the appellant mortgagor has public duties to perform is a proposition that cannot be considered as seriously debatable. In consideration of the street railway company's occupying the streets with its tracks and cars, it is obliged to perform the public duty of carrying the public on its cars."

Now we have shown that in the case of State ex rel Knight v. Helena Power and Light Company, 22 Mont., 391, that the Supreme Court of the state as to this particular company decided that the right it possessed to occupy the streets of the city of Helena was a license merely and was not the grant of a franchise which imposed upon the company the duty to maintain and operate its line. If it could abandon this right, as it was there held, it must be conceded that it could sell or mortgage it. The powers of eminent domain, etc., the grant of which are considered as the reason for the rule prohibiting railroads from alienating their property, do not exist in this company.

In the said Knight case (22 Mont., 393) the Supreme

Court of Montana uses the following language:

"Is the operation of the line of street railway which respondent has abandoned an act specially enjoined as a legal duty. We think it is not. It does not appear that the charter of respondent or the statute under which it was organized, requires it to maintain or operate a line of railway; nor is it claimed that the State has delegated to respondent the right to exercise the power of eminent domain." The reason for the rule ceasing the rule itself ceases, consequently appellee's position from that standpoint is also untenable. Again, if we take the test he seeks to apply, i. e. that "a gas company or an electric light company is subject to exactly the same restrictions in the matter of executing mortgages upon its property as is a street railway," and we admit we can see no reason why such is not the law, then we find that no such restriction exists on companies carrying on the gas or electric lighting business. Probably the latest case on the subject is that of Hunt v. Memphis Gas Light Co., 95 Tenn., s. c. 31 S. W. Rep., 1007 from which, because of its cogency and the collection of authorities that is there made we make the following quotation:

"It is insisted by complainants that corporations to which are given large powers and valuable privileges, from the exercise of which it is expected the public will derive advantages, are impliedly restrained in their power of alienation, railroad companies falling in this class; and it is insisted that gas companies are quasi public corporations, and are governed by the same rules, and in the absence of legislative authority, cannot exe-

cute a valid mortgage. Many authorities are cited by counsel for complainants, and much reliance is placed upon the case of Portland Natural Gas & Oil Co. v. State, an opinion by the Supreme Court of Indiana, reported in 8 Am. R. & Corp. Rep., 640 (34 N. E. 818), and the note thereto. All of these authorities have been carefully considered; and none of them support the contention of counsel for complainants to the extent claimed. They mainly discuss the question whether or not gas companies, water companies, and the like are quasi corporations, and some of the cases so hold. Some of them place the holding upon the ground that the right of eminent domain had been conferred upon the corporation, which is not the case with regard to the Memphis Gas Light Company; and others, again, place the decision upon the ground of an exclusive pirvilege given the company to occupy the streets, alleys, lanes, etc., of a city; thus practically giving it, in such case a monopoly of supplying the city with gas. In the case of Gas Company v. Williamson, 9 Heisk. 314, it was held by this court, in 1872, that it was not the intention of the legislature in the act incorporating the Memphis Gaslight Company, to confer the exclusive right to manufacture gas in that city. It thus appears that there are material differences between the case at bar, and those relied upon by the complainants. None of the authorities, however, hold that a gas company is without power to execute a mortgage.

"It is said by the Supreme Court of the United States, at an early day, that "it is well settled that a corporation, without special authority, may dispose of the lands,

goods and chattels, or any interest in the same, as it deems expedient, and in the course of their legitimate business, may make a bond, mortgage bond, note or draft; and also make composition with creditors or an assignment for their benefit with preferences, except when restrained by law." Canal Co. v. Valette, 21 How., 424. This language is quoted with approval by this court in Adams v. Railroad Company, 2 Cold. 645, 660. As was said in a subsequent case in respect to Adams v. Railroad Company: "The simple question presented was, had the mayor and aldermen of the city of Memphis the power, under their charter, to mortgage their real property or estate for corporation purposes?" And the court decided it had. McKinney v. Hotel Co., 12 Heisk. 104-120. A municipal corporation is confessedly a public corporation; and if the power to mortgage is enjoyed by a municipality, it is difficult to perceive upon what principle of public policy this power should be denied a gas company, even though it is a quasi public corporation. In 2 Cook Stock., Stockh. & Corp. Law, sec. 779, at page 1261, it is said: "A corporation, other than railroad corporations may mortgage its real estate and personal property for the purposes of securing its bonds or other evidence of debt, unless there is some provision in its charter expressly prohibiting or regulating this right. The right to mortgage is the natural result of the right to incur a debt." Numerous cases are cited in the note; and further on, discussing the same subject under the title "Gas Companies," the same author says: "A gas company may give a mortgage on its plant." Section 927,

p. 1262. Mr. Beach lays down the doctrine broadly that all corporations unless restrained by their charters, have implied power to mortgage," the only exception being that of railroads." 2 Beach Priv. Corp. secs. 388, 389, 738, et seq. To the same effect, see Jones Mortg. sec. 124; Mor. Priv. Corp. sec. 346; Detroit v. Mutual Gaslight Co., 43 Mich. 594, 5 N. W. 1039; Hays v. Gas Co., 29 Ohio St. 330. Though the authorities in other states agree in holding that a railroad corporation, owing to the peculiar relation which it bears to the public, should be denied the right to execute a mortgage, unless it has express legislative authority therefor, yet as a matter of fact, this power is always conferred; and indeed, it is doubtful whether a railroad could be successfully operated without the power to mortgage. Thus, the practical results of business have demonstrated the unsoundness of the reasoning on which the principle was established that it was against public policy to confer upon railroad corporations the power to execute mortgage or trust deeds."

"Our conclusion is that the Memphis Gaslight Company was authorized to execute the mortgage in question. This conclusion renders it unnecessary to consider the effect of the act of 1885, conferring upon certain corpora tions the power to execute mortgage o rtrust deeds."

In People v. Mutual Gaslight Co., 38 Mich., 154, it was held that the right of a gas company to pay pipes in a street under permission of the municipal government is not a state franchise but a local easement, resting in contract or license. The only case, other than those of commercial railroad companies which appellee has cited is

that of Richardson v. Sibley, 11 Allen 65, s. c. 87 Am. Dec., 700, but as to that case the Supreme Court of Massachusetts in 1892 in the case of Evans v. Boston &c. Co., 31 N. E. Rep., 698 says as follows: "In Richardson v. Sibley, 11 Allen, 65 it was held under St. 1864 C. 229 sec. 24, providing that 'no street railway corporation shall lease or sell its road or property, unless authorized so to do by its charter, or by special act of the legislature' that such a corporation could not mortgage its property." It consequently cannot be considered as of any pertinency to the case at bar where such statutes as those of Montana are applicable.

Again, if not upon its face beyond the corporate authority, a contract will be presumed to be valid.

Union Water Co. v. Murphy's Flat &c. Co., 22 Cal. 620.

Aurora &c. Soc. v. Paddock, 80 Ill., 263.

Not only, we submit, has this presumption as to the validity of the instrument in question not been rebutted, but its due execution has been shown by both general law and express statutory authority.

IV.

In our original brief herein on pages 21 and 22 we asserted that such "franchises" as are included in the deed of trust under discussion could not, in the nature of things, be such as might be within the purview of section 17 of Article XV of the Montana Constitution, and we cited a number of authorities to sustain that contention. Much has been said in opposition to this by appellee in his original brief. A consideration of the cases he cites,

however, and additional ones that we have found only strengthen our position. By reference to the brief of counsel for appellants in the case of State ex rel Knight v. Helena Power and Light Company, 22 Mont., 391-393, it will be seen that the points and many of the authorities set forth in appellee's original brief, pages 13-15, particularly to the effect that the privilege to occupy the streets and operate a street railway line thereon was a contract; that the consideration and benefit to the public supporting this contract was the continued operation of the road (to sustain which latter proposition Article XV sec. 17 of the Montana Constitution was cited *inter alia*) were all urged upon the attention of the Montana Supreme Court, and yet the Supreme Court held such grant a permission or license, merely, which might be abandoned by the company, which it was under no legal obligation to continue to exercise. In the light of this decision it seems idle to assert that such franchise is non-alienable unless the conveyance thereof be coupled with the obligation to answer for all liabilities past and present of the conveying company. The Supreme Court of Washington, which it will be remembered has substantially the same Constitutional provision as that of Montana, in discussing the nature of such an easement says:

"The Tacoma Electric Company did not assign or transfer any franchise or privilege granted to it by the state. It simply assigned to respondent a privilege which the city, in plain terms, had granted to it and its assigns; and that right, in our judgment, was included in that class of property which the statute provides may be

bought, held, mortgaged, sold, and conveyed by a corporation organized in accordance with the laws of this state. 1 Hill's Code, sec. 1500; Klosterman v. Railroad Co., 8 Wash., 281, 36 Pac. 136; Hovelman v. Railroad Co., 79 Mo., 632; Willamette Woolen Manfg. Co., v. Bank of British Columbia, 119 U. S., 191, 7 Sup. Ct., 187. In People v. Mutual Gaslight Co., 38 Mich., 154, it was held that the right of a gas company to lay pipes in a street under permission of the municipal government is not a state franchise, but a local easement, resting in contract or license. The same principle of course applies to the right to erect and maintain electric poles and wires in the streets under a municipal grant."

Commercial Electric Light & Power Co. v. City of Tacoma, 50 Pac., 592, 594.

And again, we repeat the following language from Klosterman v. Mason Co. C. R. R. 8 Wash., 281, s. c. 36 Pac. 136:

"In this case there is no showing that the appellant corporation ever acquired any of its property except by purchase and under those circumstances it was under no obligation to the public to retain its property or to continue its business longer than it deemed it expedient to do so." This applies to the situation of the appellant corporation here, and, it is submitted, that in the light of those authorities the argument of appellee to the effect "It (Const. Art. XV sec. 17) means that the legislature may authorize corporations holding franchises, as it might before the constitution, to convey property held by them subject to public uses, but that any law permitting them

to do so, must be subject to the provision that the property in the hands of the alienee should remain subject to any debts incurred by its predecessor in the operation, use and enjoyment of the property (that is, the property should not be relieved of the liability) and the original owner should remain liable for torts committed by the party into whose charge or possession it placed the property," page 18 of his original brief, is wholly untenable. Such argument would necessarily, if carried to its logical extent, leave a vendor company responsible for all liabilities that might at any time be incurred by the vendee. Indeed, if we understand him, that is precisely what appellee asserts in the above quoted passage from his brief. The bare statement of the proposition shows its absurdity.

Again, appellee asserts that we do not attempt to enlighten the court upon the question of the meaning of said section. We thought we did so by the quotations from the cases cited in our original brief on pages 27-29. But if there is any doubt upon that point, appellee has cited a case in his reply brief, Lee v. Southern Pac. R. R. Co., 116 Cal., 97, s. c. 47., 932 (he cites it upon another point, however) in which the following language is used:

"Section 10 of Article 12 of the constitution declares: 'The legislature shall not pass any law permitting the leasing or alienation of any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment or such franchise, or any of its privileges.' Upon this language appellant contends that the constitution gives one a right

of action against the corporation which has owend property for an injury which has resulted to him in the use of such property in the hands of a lessee or grantee of the original owner, and from this he insists that his right of action against the defendant is established by the constitution itself. The section in question was adopted by the constitutional convention without debate. It is a provision peculiar to this state. It has not so far received judicial interpretation; yet we think no difficulty need be experienced in arriving at its true meaning. It is not to be construed as a grant of authority to lease, but as a restriction upon the power of the legislature to make such grant of authority. Abbot v. Railroad Co., 80 N. Y. 27; Railway Co. v. Morris, 68 Tex., 49, 3 S. W. 457. It declares: (1) That, if a lease or sale shall be made of the franchise or property of a corporation, the lessee or grantee shall take such franchise or property *cum onere, subject to any of the liabilities of the grantor at the time existing and enforcable against the franchise or property.* This provision is for the very obvious purpose of preventing a corporation, by selling or assigning its franchise or property, from saving harmless the franchise or property, and leavngi remediless one who but for the lease or sale could have enforced against the property a judgment which he might recover."

In the language of the Supreme Court of Washington in Klosterman v. Mason Co. R. R. Co., *supra*, "We do not think that there is anything in the law, or this provision of the Constitution wihch inhibits a corporation from voluntarily transferring property for the payment of debts

for which the property so transferred is legally bound."

V.

It is next said in appellee's supplemental brief that if the title of the property passed at the date of the deed of trust under consideration, the Central Trust Company would be liable for the torts of the Helena Power and Light Company in the operation of such property. How such a doctrine could be applied to such a conveyance as this is not clear. No authorities are cited to support it. Those cited by appellee relate only to leases. But even if it could be successfully maintained, then it would necessitate a law action against the Central Trust Company and a judgment therein. There is no pretense that this has been done. It is said, however, that the Central Trust Company has admitted the truth of the allegations of the answer. This is tenable, only, to the extent that Warren obtained a judgment against the Helena Power and Light Company for personal injuries in 1901; that the liability which was the foundation of such judgment was incurred by said last named company in the operation of the franchises granted to it by the city of Helena and that the facts constituting said liability were set out in his complaint in the state court against said Helena Power and Light Company. See Record page 48.

No reason is advanced by appellee to support the judgment in his favor.

It is therefore respectfully submitted that both by reason and authority appellee's judgment in the state court is not superior to the claim of the Central Trust Company,

that the circuit court erred in holding otherwise, and that it should be reversed.

Helena, November 10, 1902.

BUTLER, NOTMAN, JOLINE & MYNDERSE,

H. G. & S. H. McINTIRE,

Solicitors for Appellant Central Trust Company.

H. S. HEPNER,

Solicitor for Appellant Helena Power and Light Company